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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 252

LEE YOUNG, LEE DEER, AND RALPH L. POLK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 53–57) has not yet been reported.

JURISDICTION

The order of the circuit court of appeals denying petitioners' motions to remand the cause to the district court was entered July 10, 1947 (R. 57). The petition for a writ of certiorari was filed August 9, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether evidence that the jury erroneously reported convictions on particular counts in the mistaken belief that such counts charged the offenses of which it intended to find petitioners guilty, requires the grant of a new trial rather than correction of the record to reflect the true verdict on which agreement was reached.

STATEMENT

Petitioners and others were tried on a five-count indictment returned against them in the United States District Court for the District of Kansas. The first count charged a conspiracy to violate the liquor laws; the second, the carrying on of the business of a liquor dealer without paying the tax required by law (26 U. S. C. 3253); the third, the purchase of distilled spirits from a person other than an authorized rectifier (26 U. S. C. 2860); the fourth, failure to keep records (26 U. S. C. 2857); and the fifth, failure to keep a sign posted (26 U. S. C. 2831). The jury returned a verdict finding petitioner Deer guilty on counts 1, 2, 3 and 5, petitioner Young guilty on counts 1, 3 and 4, and petitioner Polk guilty on counts 2 and 5. Motions for a new trial were denied, sentences imposed, and appeals noted. (R. 53.)

Subsequently, petitioners moved the district court to request the circuit court of appeals to remand the cause for further proceedings on their motions for a new trial to enable them to present newly discovered evidence that the jurors had made a mistake in their verdict (R. 1–11). The district court declined to act on the motion on the ground that the cause was pending in the circuit court of appeals (R. 11–13).

Petitioners then filed in the circuit court of appeals separate motions to remand the cause for further proceedings on their motions for a new trial (R. 13–15, 30–32, 35–37). Petitioner Deer attached to his motion affidavits by two jurors to the effect that another juror showed prejudice against Polk and referred to Deer's association with Polk in crimes other than those disclosed by the evidence at the trial (R. 32–34). Petitioners Young and Polk attached to their motions affidavits by each of the jurors to the effect that all of them intended to convict Polk of conspiracy and acquit him of selling liquor without a license, and to convict Young of selling liquor without a license and acquit him of conspiracy, but that, as a result of their confusion with respect to the offenses charged in the particular counts, they had erroneously reported a verdict of guilty against Polk for selling whiskey and against Young for conspiracy (R. 16–30, 37–52). The circuit court of appeals denied the motion to remand (R. 57). It held in effect that Deer's

CONCLUSION

The decision below leaves petitioners free to obtain all the relief to which they may be entitled. We respectfully submit that the petition for a writ of certiorari should therefore be denied.

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